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No._____

IN THE

Supreme Court of the United States

October Term, 1989

NATHANIAL C. MATHES, also known as
NATHANIAL C. MATHEWS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Does the use of headphones in a trial deny Petitioner his right to a public trial guaranteed by the Sixth Amendment of the United States Constitution when portions of his trial were played on headphones, so that only the jurors, parties, and Court heard testimony between Petitioner and the Government informer? The viewing public and audience in the Courtroom did not hear said testimony and thereby were excluded.

2. Does the exercise of a peremptory challenge of the only black juror by the Government's attorney against Petitioner who is black deny Petitioner equal protection of the Fifth Amendment of the United States Constitution and violate the rule of *Batson v. Kentucky*, 476 U.S. 79?

3. Does the admission of tapes by the Trial Court of alleged conversations between Petitioner and the Government informer violate Federal Rule of Evidence 801, the Sixth Amendment right to confront his accuser, and the federal test for admissibility as set forth in *United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983)?

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WHO IS BLACK, DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT UNDERMINES PETITIONER'S RIGHT OF EQUAL PROTECTION AND IS INCONSISTENT WITH THIS COURT'S PRIOR RULINGS AND REQUIRES PROMPT CLARIFICATION 12

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PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this case. That Judgment affirmed Petitioner's conviction of two counts of intent to distribute cocaine, Count I as an aider and abetter and Count II intent to distribute cocaine in violation of Title 21 United States Code Section 841(a)(1) and Title 18 United States Code Section 2.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, not reported and not recommended for full text publication, is set forth in Appendix, *infra*, pp. A1 through A13. The Judgment and Commitment Order from the United States District Court for the Northern District of Ohio, Western Division is set forth in Appendix, p. A14.

JURISDICTION

The Opinion of the Court of Appeals affirming Petitioner's conviction was filed September 18, 1989, Appendix, *infra*, p. A1.

This Petition seeks review of the Judgment of the United States Court of Appeals in a criminal case. This Court has jurisdiction to grant this Petition under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES OF EVIDENCE INVOLVED

The Fifth Amendment provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused party shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Evidence 801 provides:

a. Statement. A statement is (1) an oral or written assertion or (2) non verbal conduct of a person, if it is intended by him as an assertion.

b. Declarant. A "declarant" is a person who makes a statement.

c. Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

STATEMENT OF THE CASE

On April 6, 1988, a Federal Grand Jury sitting in the Northern District of Ohio, Eastern Division, returned a two (2) count indictment against Nathanial C. Mathes, also known as Nathanial C. Mathews (hereinafter referred to as Mathes). The first count alleged that Mathes and a co-defendant, Dennis A. Brown, knowingly and intentionally possessed with intent to distribute and did distribute approximately two (2) kilograms of cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2. The second count alleged Mathes knowingly and intentionally possessed with the intent to distribute and did distribute approximately five (5) kilograms of cocaine, in violation of Title 21, United States Code, Section 841(a)(1). On April 15, 1988, Petitioner appeared with retained counsel, Jon Richardson, and entered a plea of not guilty before United States Magistrate James G. Carr.

After pretrial discovery was concluded and the district court ruled upon a defense motion attacking the validity of the Sentencing Guidelines, a pretrial was held on August 1, 1988, to determine a trial date. The jury trial was set to begin October 3, 1988, and all parties were to submit any proposed jury instructions a week prior to that date.

On August 26, 1988, a plea agreement was entered into between Dennis A. Brown, Mathes' co-defendant in the first (1) count, and the government. Brown entered a plea to the first count of the indictment and agreed to testify against Mathes at the upcoming trial. Several days later, on September 3, 1988, Brown was found shot to death in his home by unknown assailants. Petitioner had been incarcerated in jail since March 19, 1988.

On September 22, 1988, Mathes filed a motion to suppress "any and all conversations between himself and one Dennis Brown, which were the subject of electronic eavesdropping . . ." In that Motion, Mathes argued that the telephonic communications and the face to face conversation between himself and Dennis Brown had been recorded without Petitioner's knowledge or consent and therefore their admission at trial would be a violation of Title III of the Omnibus Crime Controls and Safe Street Act of 1968 (hereinafter referred to as Title III) and the fourth amendment to the Constitution of the United States. On September 29, 1988, a hearing on the Motion was held before the Honorable Nicholas J. Walinski. In an Order and five page Opinion filed September 30, 1988, the request to suppress the recordings was denied.

A jury having been seated on October 3, 1988, the trial began October 4, 1988. On October 6, 1988, the jury returned a verdict of guilty as to both counts set forth in the indictment.

On December 5, 1988, Mathes was sentenced to a term of imprisonment of one hundred fifty-one (151) months and a five (5) year period of supervised release thereafter. It is from this judgment order of conviction and sentence from which Mathes appeals.

On Saturday afternoon, March 19, 1988, Petitioner was arrested by F.B.I. Agents pursuant to a drug surveillance at the Dorr-Secor Shopping Center behind Studio One. Subsequently Petitioner-Mathes was charged with Counts I and II of a criminal indictment of intent to distribute cocaine, more specifically Count I as an aider and abettor. Further, the F.B.I. acting pursuant to a drug surveillance had earlier arrested a Dennis Brown, the Government informer, at approximately

10:30 in the morning at Brown's residence on Saturday, March 19, 1988. Thereafter Brown agreed to cooperate with the Government and pursuant to the Government's instructions set up a purported drug buy of cocaine from the Petitioner-Mathes. Further, that purportedly there were three (3) taped conversations between Mathes and the informer, Brown, and that Brown went out to meet Mathes at Studio One in the City of Toledo, Ohio, on the afternoon of March 19, 1988 with a body wire attached to his person.

During the course of trial the Petitioner-Mathes contended that the discussions dealt only with doors and not with any drug deal or transactions. The Government contended that it was a drug transaction between the Government informer, Brown, and the Petitioner-Mathes.

The Government was represented by Thomas Secor and Mathes was represented by co-counsel Jon D. Richardson of the City of Toledo and William A. Garrett of Temperance, Michigan.

During the course of the trial several objections were interposed by the Petitioner, namely suppression of the taped conversations between Brown and Mathes; on the basis of hearsay, violation of the confrontation clause of the Sixth Amendment. Petitioner further objected to the playing of the tapes with the jury, the parties, counsel and the Court wearing headphones. The public in the Courtroom could not hear the tapes being played. Petitioner moved for a mistrial and was overruled by the trial judge. Petitioner also objected to the only black juror being stricken by the Government's attorney on a peremptory challenge.

REASONS FOR GRANTING THE WRIT

I. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE USE OF ELECTRONIC HEADPHONES TO THE EXCLUSION OF THE PUBLIC SO THAT ONLY THE PARTIES, COUNSEL, AND THE COURT COULD HEAR TESTIMONY VIOLATES THE SIXTH AMENDMENT RIGHT THAT PETITIONER HAS TO A PUBLIC TRIAL. IT REQUIRES PROMPT CLARIFICATION. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED THIS IMPORTANT QUESTION INCONSISTENT WITH PRIOR SUPREME COURT DECISIONS.

During the course of the trial the government proposed to play alleged taped conversations purportingly to set up a cocaine delivery between the government informer, Brown and Petitioner for the afternoon of March 19, 1988. Petitioner's counsel objected to this proceeding of all the jurors, parties, counsel, and Court wearing earphones to hear an amplified version of the tapes and the spectators could not hear the tapes that were being played to the jury who had the earphones on. On page 114 of the trial transcript the following occurred in open Court:

> "MR. GARRETT: Your Honor, before we go any further, is the Defendant and the Defense Counsel, are we going to have earphones too?
>
> MR. SECOR: Of course, your Honor.
>
> THE COURT: The only ones who won't be able to hear are the audience.
>
> A. These are the slide switches—

MR. GARRETT: Well, let me, let me say this, this is a public trial, isn't all the proceedings in Court supposed to be open to the public, can't they just play this on a device so that everybody can hear?

THE COURT: Can you do that, Mr. Secor?

MR. SECOR: No, your Honor, this type of equipment is not compatible with that type of—

MR. GARRETT: I object to these proceedings, the Defendant is entitled to a public trial, an open trial to the public and this is all part of a procedure that is, that is foreign, as far as I'm concerned to American Constitution, if they want to play—

THE COURT: If any of the audience want to hear the tapes we will permit them to hear them afterwards.

MR. SECOR: That's fine, your Honor.

MR. GARRETT: Well, no, I must respectfully ask that this be public and that this be heard for everybody."

Thereafter on page 122 of the trial transcript the alleged taped conversations between informant, Dennis Brown, and Petitioner were played to the jury who had headphones or earphones on as well as counsel, parties, and the Court and the Court reporter. It should be noted that the entire alleged taped conversations between Brown and Petitioner were not recorded by the Court reporter.

"NAGRA recordings played through headphones; no audio portion on tape."

Therefore there is no record in the transcript for this Honorable Court to determine what the jury and all other parties heard concerning the alleged conversations between Brown and Petitioner.

Sixth Amendment to the U.S. Constitution (1791) states in all criminal prosecutions the accused shall enjoy the right to a speedy and *public* trial.

The right to a public trial is applicable to state proceedings as well as federal court proceedings. *See In Re: Oliver,* 333 U.S. 257 (1948). The right to a public trial belongs to the defendant. *See Gannett Co. v. DePasquale,* 443 U.S. 368 (1979). The right covers the entire trial, including the impaneling of the jury, the opening statements, the presentation of evidence, the arguments of counsel, the instructions to the jury, and the return of the verdict. *See In Re: Oliver,* 333 U.S. 257 (1948).

There are several ways in which a defendant can benefit from having a public trial. Most importantly it is a safeguard against any attempt to employ our Courts as instruments of persecution. The knowledge that every criminal trial is subject to review by the public is an effective restraint on possible abuse of Judge's power. *See In Re: Oliver, supra.* To show a violation of this right, it is not necessary for the defendant to establish that he was prejudiced in any specific way by the exclusion. *See Waller v. Georgia,* 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Therefore only a defendant can waive his right to a public trial. In this case Petitioner was denied his fundamental right to a public trial when jurors and all other parties including the Court listened on headphones to alleged tape conversations between Brown and Petitioner to the exclusion of the spectators and Petitioner's family who were in attendance in the Courtroom throughout the entire trial.

On page 343 of the trial transcript the trial Judge himself expressed concern that the taped conversations should be played out loud in the Courtroom so the jury and audience could hear. On page 343 of the trial transcript the trial Court stated:

> "THE COURT: They should be up in the room up there. In the future, Mr. McCorkle, I would suggest that if there's any way you can put these tapes on a different kind of cassette that you can play out loud it might be better procedure, I'm satisfied that this is alright but a Court of Appeals might not like the fact that the audience, not all of the audience can hear what the jury heard."

The Sixth Circuit Court of Appeals in their opinion determined that Petitioner waived his argument by refusing the trial Judge's offer to let the audience listen to the tapes during a recess. The Court of Appeals cited cases that talked in terms of trial strategy. In this case Petitioner says the constitution guarantees a public trial for the benefit of the accused.

II. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE SIXTH CIRCUIT'S HOLDING THAT THE EXCLUSION OF THE ONLY BLACK JUROR BY THE GOVERNMENT'S TAKING OF A PEREMPTORY CHALLENGE AGAINST PETITIONER, WHO IS BLACK, DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT UNDERMINES PETITIONER'S RIGHT OF EQUAL PROTECTION AND IS INCONSISTENT WITH THIS COURT'S PRIOR RULINGS AND REQUIRES PROMPT CLARIFICATION.

An examination of the voir dire proceedings in the matter at bar reveals the Prosecutor exercised two peremptory challenges, one of which eliminated the only black juror in a case involving a black defendant. Although a Prosecutor is ordinarily entitled to exercise peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried, there are constitutional guarantees afforded a black defendant which forbids a Prosecutor from excluding a potential juror solely on account of their race.

The first and foremost of these constitutional guarantees is that of equal protection as found in the Fifth and Fourteenth Amendments which prohibit a state from denying a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposely excluded. Other constitutional guarantees such as the Sixth Amendment right to a trial by an impartial jury have been interpreted by the Court's to mean a fair cross section of the community. In *Glassner v. United States*, 315 U.S.

60, 62 S. Ct. 457 (1942) the Court reasoned that a federal jury panel to be properly functioning requires that it be a body truly representative of the community, and not the organ of any special group or class.

The concept of due process of law also incorporates the notion of essential demands of fairness and a black defendant's constitutional right to a fair and impartial jury before his peers may be violated when a Prosecutor, as in the matter at bar, uses peremptory challenges to systematically exclude blacks from the jury when the very idea of a jury is a body composed of peers or equals of the person whose rights it has been selected or summoned to determine.

Controlling authority at present, *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), holds that a state denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposely excluded. The Court reasoned in *Batson* that the equal protection clause of the Fourteenth Amendment forbids a Prosecutor from challenging potential jurors solely on the basis of their race and held that a prima facie case of discriminatory selection is made out when the defendant shows (1) that he is a member of a cognizable racial group and that the Prosecutor has used a peremptory challenge to exclude from the venire members of defendant's race, and (2) that the facts and circumstances raise an inference of purposeful discrimination.

Applying the test in *Batson* to the matter at bar this case involved a black defendant and the only black impaneled from the jury pool was a Mr. Johnny Hutton whom the Prosecutor exercised one of two peremptory challenges to exclude. An appropriate objection to this was raised by defense counsel with which the Court

agreed but nevertheless excused Mr. Hutton on the basis that the Prosecutor excused the juror by exercising a peremptory challenge.

Under the standard as articulated in *Batson*, once the defendant has made a prima facie showing, the burden is on the Prosecutor to provide a racially neutral explanation of its challenge of members of defendant's racial group. In regard to the reasons cited by the Prosecutor for excluding this juror the Court stated "I can't accept that reason" and was informed by the Prosecutor it was not a question of acceptance by the Court. The trial Court then ruled, if the Prosecutor exercised a peremptory challenge the Court would grant it.

Accordingly, the only black juror was excused in noncompliance with the mandates in *Batson* which resulted in the Court's condoning a racially motivated use of peremptory challenges which denied Petitioner's Sixth Amendment right to an impartial jury. Further inherent from the Court's ruling were due process and equal protection violations which impeded Petitioner's right to a fair and impartial trial.

The issue herein was recently addressed in the Sixth Circuit in *Boles v. Foltz*, 816 F.2d 1132 (1987), where this Court held that the standard announced in *Batson* for proving an unconstitutional abuse of peremptory challenges would apply to all cases decided after *Batson* but would not apply retroactively on collateral review of convictions that came final before *Batson*.

III. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE SIXTH CIRCUIT'S HOLDING THAT ALLOWED THE ADMISSIBILITY OF TAPED CONVERSATIONS BETWEEN PETITIONER AND THE GOVERNMENT INFORMER VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO BE CONFRONTED WITH HIS ACCUSER AND REQUIRES PROMPT CLARIFICATION.

On March 19, 1988 a Mr. Dennis Brown was arrested for delivery of cocaine. This delivery was through a controlled buy set up by the F.B.I. and an informant named Kenny Hopson. Subsequent to Dennis Brown's arrest he turned informant that same day after being advised by his attorney that any cooperation he would provide the Federal authorities would be made known to the United States Attorney's Office. Accordingly, Dennis Brown agreed to allow the Federal authorities to wire him and to engage him in setting up a controlled buy of illegal drugs.

In regard to the issue of admissibility of the transcripts of the tapes the Federal test for admissibility is that set forth in *United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983). Under *Robinson* the procedure as set forth by this Circuit requires a stipulation as to the accuracy and fairness of the transcript or in the absence of a stipulation an independent determination by the trial Court and verification by the transcriber. The rationale behind these requirements is to ensure basic safeguards of reliability.

In the matter at bar there was no stipulation as to the accuracy of the transcript. Nor does it appear from the record that the trial Court made any independent determination as to the accuracy of the transcript.

Contrary to the reasoning and holding in *Robinson* the trial Court in the instant case left the determination of accuracy to the jury on a transcript prepared by the investigating agent.

Defendant further contends the Court abused its discretion in allowing the jury to have a transcript of the taped conversation between Petitioner and Dennis Brown to refer to during deliberations when there was no independent determination of accuracy and further when accuracy was not established to any degree of certainty and that it only reflected the subjective impression of the police as to what was said. In essence the Court usurped its own function of making an independent judicial determination of accuracy and delegated this function to the jury.

The Court's ruling as to admissibility of both the tapes and transcript is found at pages 111-113 of the trial transcript and set forth herein:

> "THE COURT: —alright, they are therefore not hearsay and other cases have decided that. As long as the consent is voluntary and we have three written documents here with the advice of counsel and that Brown signed, that is reliable, can't anything be more reliable than his consent to do this, so therefore the tapes are admissable, as such, against the Fourth Amendment, as against any hearsay objection and as far as any invasion of privacy. Now, the procedure at this point, we will let the jurors listen to the tapes first, without the transcript. If they have any doubt about what they heard, then we'll run them again with the transcript as an aid, but this procedure has been used before, I've used it in Grand Rapids and I've used it in Cincinnati, where you have a tape transcript that is used along with the tape and it's been upheld each time I've used it, so this is not a new problem.

MR. RICHARDSON: Your Honor, I respectfully take exception.

THE COURT: You take exception but we will run the tapes and let the jurors listen to them first and if they are then unclear as to what they heard or the tapes are inaudible in portions, we'll let them look at the transcripts and decide what they heard.

MR. SECOR: Your Honor, will they be notified of this fact prior to their listening to the tape, that this is available to them if they are unable—

THE COURT: Yes.

MR. SECOR: Thank you.

THE COURT: I think we're in recess now until 1:00.

(Recess from 11:35 until 1:00 p.m.)
(July in at 1:00 p.m.)

THE COURT: Ladies and gentlemen of the jury, during the interim the Court has ruled that the tapes that were testified to are admissable and the jury will be permitted to hear them. The Government has also prepared a transcript of the tapes but there is an objection to those on the grounds that they may be Mr. McCorkle's interpretation of what he heard and that should be your job, so the way we'll work this, we'll let you listen to the tapes first and if you think you need the transcripts we'll play them again and you can follow along with the transcripts, that'll eliminate any problem with the tapes, then."

The Government moved to admit and did admit both the tape and the Government's version of the transcript into evidence over objection. The Court's reasoning was that tapes don't constitute hearsay under *United States v. Traficant*, 558 F. Supp. 996 (N.W. Ohio, 1983). *Traficant*, also held that when

the Court rules on a motion to suppress, the most important factor to consider is accuracy and trustworthiness of the evidence. The Court also ruled that the trustworthiness coefficient is to be weighed against the potential for undue prejudice when challenged evidence is presented to the jury and should only be received with an appropriate cautionary instruction. In short, this judicial mandate in *Traficant* was overlooked by the trial Court and not considered in its decision.

A close analysis of *United States v. Hathaway*, 798 F.2d 902 (Sixth Cir. 1986) reveals that this case had nothing to do with a ruling on hearsay in the context of a tape recording. What *Hathaway* did address was that when statements are offered to prove the falsity of the matter asserted, there is no need to assess the credibility of the declarant. Accordingly, there was no argument by the prosecutor that the tapes were being used to show the falsity of the matter asserted, thus rendering *Hathaway* inapplicable. Specifically focusing on the statements in the tape the only thing Petitioner denied was the Prosecutor's subjective interpretation of what they believed the tape to purport. As such the tape was clearly admitted by the prosecution for one purpose, that being their concept of the trust of the matter asserted.

It is also important to note that Dennis Brown's credibility was at issue throughout the trial by virtue of the fact that Brown had been caught earlier the same day and charged with possession of two kilos of cocaine. Accordingly, the need to assess the credibility of Brown is of paramount concern and contrary to any exception to hearsay as held in *Hathaway*.

In regard to the recorded conversations between Dennis Brown and Petitioner there is no mention of the words—drugs or cocaine—and the same can only be obtained through inference and speculation.

A suppression hearing was held on September 29, 1988 before the Honorable Nicholas Walinski to suppress the tapes from the Prosecutor's case in chief and on this issue the Court took the matter under advisement and reserved its ruling until trial.

At trial the Court allowed the tapes into evidence over strenuous objections to hearsay, best evidence rule, and the secretive nature of the tapes which were presented to the jury.

Before addressing the issue of admissibility of the tapes and transcripts of the tapes it needs to be emphasized that the procedure employed by the Court in conveying the contents of the tapes to the jury can only be described as shocking and foreign. The Court permitted Special Agent McCorkle of the F.B.I. to set up special electronic equipment with headphones/earphones for each juror with specially equipped volume control devices. The Court then permitted the F.B.I. Agent to instruct the jurors on how to use the equipment. After repeated objections to the nature of this procedure contravening one's right to a public trial with open proceedings the Court instructed the jurors that the F.B.I. Agent would "*enlighten*" them with the tapes. The Court then, after ridiculing defense counsel for questioning this procedure, proceeded to play what it perceived to be the relevant portion of the tape and to the dismay of this writer failed to transcribe this portion of the proceedings and Petitioner is at a loss to refer to

the contents of the recording for lack of a record. As noted in the record at page 122 of the trial transcript is the following:

> "NAGRA recordings played through headphones; no audio portion on tape."

Of germane significance, the procedure employed by the Court concerning the playing of the tape is best summarized by a comment made by the trial Judge at page 343 of the trial transcript:

> "In the future, Mr. McCorkle, I would suggest that if there's any way you can put these tapes on a different kind of cassette tape that you can play out loud it might be a better procedure. *I'm satisfied that this is alright but a Court of Appeals might not like the fact that the audience, not all of the audience, can hear what the jury heard.*"

It is the contention of Petitioner that there is a need for concern on behalf of the Court when they engage in procedures which appear to be secretive, private, non-public, controlled by the investigative authorities, is reinforced by the Judge the procedure and tapes will enlighten the jurors, no record is made for Petitioner's review and counsel is severely criticized and threatened with contempt for questioning or objecting to the procedure. Accordingly, this writer views the same as contrary to constitutional guarantees of due process of law and more akin to Iranian justice where convictions can be obtained via secret tapes under government control absent any record for review purposes.

In summary, the trial Court was blinded from recognizing hearsay in accordance with the authority on which the prosecutor relied. Further, Petitioner was blatantly denied his Sixth Amendment right of confrontation in regard to the person accusing Petitioner as being involved with him in some criminal enterprise.

The Sixth Circuit Court of Appeals in their opinion on page 7 simply states the government used the tapes not to prove the truth and accuracy of the statements but rather to place the sequence of events which occurred between Petitioner and Brown. This reasoning begs the question it is obvious the government wanted the tapes to prove the truth of the statements.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully urges this Court to grant the Writ of Certiorari and accept this case for review.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed September 18, 1989)

[NOT RECOMMENDED FOR FULL TEXT PUBLICATION]

No. 88-4116

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATHANIEL MATHES,
Defendant-appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff-appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: KENNEDY and KRUPANSKY, *Circuit Judges;* and MILES, *Senior District Judge.**

PER CURIAM. Nathanial Mathes (Mathes) has timely perfected an appeal from his conviction subsequent to a jury trial on two criminal counts pertaining to the

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* The Honorable Wendell A. Miles, Senior United States District Judge for the Western District of Michigan, sitting by designation.

distribution of cocaine in violation of controlled substance statutes; namely, one count of possession of cocaine with the intent to distribute the substance in violation of 21 U.S.C. §841 (a)(1), and one count of aiding and abetting another individual in the distribution of cocaine in violation of 21 U.S.C. §841 (a)(1) and 18 U.S.C. §2.

The record developed during the trial disclosed the following underlying facts. The arrest of Mathes came about as a result of an undercover operation initiated by Special Narcotics Agents of the Federal Bureau of Investigation (FBI). On March 19, 1988, the FBI arrested an individual named Dennis Brown (Brown) and charged him with possession of two kilograms of cocaine. After Brown had consulted with his attorney subsequent to his arrest, he agreed to cooperate with special agents of the FBI in their undercover investigation of cocaine distribution in Northern Ohio. Special Agents Baber and McCorkle questioned Brown about the source of his supply of cocaine. Brown advised the special agents that Mathes, the criminal defendant and appellant in the instant appeal, had sold him the cocaine. During his interrogation Brown indicated that he expected Mathes would be contacting him in the foreseeable future to collect the money Brown owed him for the two kilograms of cocaine confiscated from him at the time of his arrest.

Acting upon this information, the FBI agents permitted Brown to telephone Mathes on that same date, March 19, 1988, and to negotiate the purchase of approximately five additional kilograms of cocaine from him later that same afternoon. The telephone calls were monitored and tape recorded by the special agents.

The FBI agents placed the agreed upon rendezvous for the purchase of cocaine from Mathes under surveillance and at approximately 4:30 p.m. Mathes arrived at that location, driving an older model blue Chevrolet. As they had previously agreed, Mathes proceeded to a deserted area behind the shopping complex, where Brown approached his vehicle.

Agent McCorkle, who was located approximately fifty yards from the rendezvous point, observed Brown and Mathes engage in a short conversation, after which Mathes handed an object to Brown. Mathes thereupon slowly drove his vehicle from the scene, leaving Brown with a large, dark colored plastic garbage bag.

Special Agent McCorkle immediately placed Brown into custody and secured the plastic garbage bag and its contents, which consisted of five individual bags containing a white, powdery substance. Laboratory examination later disclosed that each of the five small bags contained one kilogram of cocaine, for an aggregate of five kilograms of cocaine. FBI agents arrested Mathes as he attempted to leave the shopping center parking lot.

Mathes and Brown were indicted on April 6, 1988 by a federal grand jury which returned a two count indictment, charging Mathes with possession of cocaine with the intent to distribute, and with aiding and abetting Brown in the possession of cocaine with the intent to distribute.

The two defendants were scheduled to be tried jointly on October 3, 1988 before a jury. On August 26, 1988, Brown entered into an agreement to plead guilty to one count of possession of cocaine and to testify against Mathes in the upcoming criminal trial. Unfortunately, on September 3, 1988, Brown was shot to death in his home.

Subsequent to trial, the jury returned guilty verdicts against Mathes on both of the charged counts. The district court sentenced Mathes to a term of one hundred fifty-one months of imprisonment, to be followed by a period of supervised release of five years. Mathes timely perfected an appeal from his conviction below.

Mathes initially contended that the government's exercise of a preemptory [sic] challenge against the only black member of the jury venire violated the teachings of the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), wherein the Court held that "the State denies a black defendants equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson*, 476 U.S. at _____, 106 S.Ct. at 1716. In *Batson*, the Supreme Court indicated that a criminal defendant could present a *prima facie* showing of racially predicated exclusion of prospective jury members "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at _____, 106 S.Ct. at 1721 (citing *Washington v. Davis*, 426 U.S. 229, 239-42, 96 S.Ct. 2040, 2047-49, 48 L.Ed.2d 597 (1976)).

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at _____, 106 S.Ct. at 1723 (citations omitted); *accord United States v. Davis*, 809 F.2d 1194, 1201-02 (6th Cir.), *cert. denied*, 483 U.S. 1007, 107 S.Ct. 3234, 97 L.Ed.2d 740 (1987). In the case at bar, the transcript of the record indicated that after the Assistant United States Attorney had exercised one of the government's allotted peremptory challenges to

strike the only black individual on the jury venire, defense counsel interposed an objection to the removal of the prospective juror, invoking the pronouncements of *Batson*. The government thereupon explained that its reason for requesting the removal of Hutton was not on account of his race, but rather because it was known to the government that he had previously been arrested on a criminal charge arising from a domestic disturbance. Although this charge had ultimately been dismissed, the government argued that the arrest could tend to predispose Hutton against the prosecution in the instant case.

In the case at bar, the district court credited the government's explanation for exercising a peremptory challenge because it was apprehensive that Hutton's previous experiences with the criminal justice system could reasonably cause him to be unfairly unsympathetic toward the prosecution. In *Batson*, the Supreme Court indicated that "[s]ince the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at _____, 106 S.Ct. at 1724 n.21 (citing with approval *Anderson v. City of Bessemer City*, 470 U.S. 654, 575, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985)); *compare Davis*, 809 F.2d at 1203. The defendant has failed to present any argument or reason to challenged [sic] the district court's decision to assign credibility to the government's neutral explanation for striking the only black jury venire member; consequently, the district court's decision as to this issue must be affirmed.

The second allegation of error charged by the appellant relates to the district court's failure to have dismissed four prospective jurors for cause because,

based upon *voir dire* examination, they stated that they would be more likely to credit the testimony of a law enforcement officer than the testimony of an ordinary citizen. Defense counsel urged the removal of these prospective jurors for cause, because they had demonstrated an impermissible bias in favor of law enforcement personnel.

The trial court overruled the defense motion to strike the jurors at issue, concluding that an appropriate credibility cautionary instruction would advise the jury that it was not to assign greater or lesser credibility to the testimony of law enforcement officials that [sic] to any other witness. Thereafter, defense counsel peremptorily dismissed only three of the prospective jurors in question from the venire and did not peremptorily remove any additional prospective jurors, although he had seven remaining peremptory challenges.

On appeal, the defendant has argued that the district court committed reversible error in refusing to dismiss challenged prospective jurors for cause. In its recent decision in *Ross v. Oklahoma*, _____ U.S. _____, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), the United States Supreme Court rejected a closely analogous argument in a capital sentencing case wherein the criminal defendant charged that the failure of the trial court to have removed a particular juror for cause because of potential bias concerning the imposition of capital punishment mandated reversal of his conviction and sentence. "[A]s there is nothing in the record to show that any juror who sat on the trial was objectionable, we are unable to discover any grounds for reversal." *Ross*, _____ U.S. at _____, 108 S.Ct. at 2276; *accord, United States v. Mercer*, 853 F.2d 630, 632 (8th Cir.), *cert. denied*, _____ U.S. _____, 109 S.Ct. 566, 102 L.Ed.2d 591

(1988) and _____ U.S. _____, 109 S.Ct. 3166, 104 L.Ed.2d 104 (1989). In the instant case, because Mathes had seven peremptory challenges which he did not utilize, and because he has failed to demonstrate that the jury panel which ultimately considered and decided his case was not impartial, any potential error which may have resulted from the district court's failure to have excused the four jury panel members at issue was thus harmless beyond a reasonable doubt.

The appellant's third assignment of error relates to the district court's admission of the tape recordings of conversations between Mathes and the FBI informant, Brown. The appellant has argued that the district court's decision was erroneous because the tape recordings of the conversations were not admissible since Brown's consent had been given under duress, because the conversations constituted hearsay, and because the procedure employed by the government to transcribe and introduce the tapes as evidence infringed upon his constitutional right to a public trial.

Mathes initially argued that Brown's cooperation had been coerced at the time of his arrest by promises of lenient treatment if he cooperated with the FBI agents. The cases which have examined similar factual patterns to those presented in the instant appeal have uniformly rejected the contention that such circumstances amount to "coercive activity" on the part of the police officials. *See, e.g., United States v. Kolodziej,* 706 F.2d 590, *reh'g denied,* 712 F.2d 975 (5th Cir. 1983); *United States v. Salisbury,* 662 F.2d 738 (11th Cir. 1981), *cert. denied,* 457 U.S. 1107, 102 S.Ct. 2907, 73 L.Ed.2d 1316 (1982); *United States Osser,* 483 F.2d 727 (3rd Cir.), *cert. denied,* 414 U.S. 1028, 94 S.Ct. 457, 38 L.Ed.2d 321 (1973); *Cooper v. United States,* 594 F.2d 12 (4th Cir. 1979);

accord United States v. Horton, 601 F.2d 319 (7th Cir.), *cert. denied*, 444 U.S. 937, 100 S.Ct. 287, 62 L.Ed.2d 197 (1979). Existing precedent thus forecloses the appellant's argument that the FBI agents' suggestion of possible leniency in later criminal proceedings to Brown served to coerce Brown in consenting to the recording of his conversations with Mathes.

The appellant additionally charged that the comments made by Brown during his conversations with Mathes, recorded on the tapes, constituted hearsay. The prosecution responded to the appellant's charges that the taped conversations constituted hearsay by noting that the Brown's statements were not being offered to prove the truth and accuracy of the statements, but rather to place the sequence of events which had occurred between Mathes and Brown into context with Mathes's admissible statements against interest. The district court agreed and overruled appellant's objection. Existing precedent supports the district court's conclusion that the introduction of the taped conversations for the above stated purpose did not constitute hearsay. *See, e.g., United States v. Rollins*, 862 F.2d 1282, 1296-97 (7th Cir. 1988), *cert. denied sub nom. Slaughter v. United States*, _____ U.S. _____, 109 S.Ct. 2084, 104 L.Ed.2d 648 (1989); *United States v. Jordan*, 810 F.2d 262, 264 (D.C. Cir.) (citing *United States v. Lemonakis*, 485 F.2d 941, 948 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989, 94 S.Ct. 1586, 39 L.Ed.2d 885 (1974)), *cert. denied*, 481 U.S. 1032, 107 S.Ct. 1963, 95 L.Ed.2d 535 (1987); *see also United States v. Saint Prix*, 672 F.2d 1077, 1083 (2nd Cir.), *cert. denied*, 456 U.S. 992, 102 S.Ct. 2274, 73 L.Ed.2d 1287 (1982); *United States v. Bruner*, 657 F.2d 1278, 1284-85 (D.C. Cir. 1981). *See generally United States v. Hathaway*, 798 F.2d 902, 905 (6th Cir. 1986).

The appellant has raised several interrelated challenges to the procedure employed by the district court in permitting the jury to hear the tape recording. In essence, the government used a system of individual headphones by which all of the jurors, the defendant, as well as counsel for both sides and the trial judge, were simultaneously permitted to hear the taped conversations. An FBI agent instructed the members of the jury in the operation of the individual tape monitoring headphones. Members of the public attending the trial were unable to simultaneously hear the contents of the tape recordings.

On appeal, the appellant asserted that the procedure employed by the district court violated the Sixth Amendment's guarantee of a public trial. *See, e.g., Gannett Co. v. DePasquale,* 443 U.S. 368, 380, 99 S.Ct. 2898, 2905, 61 L.Ed.2d 608 (1979); *In re Oliver,* 333 U.S. 257, 266-67, 68 S.Ct. 499, 504, 92 L.Ed. 682 (1949); *see also Waller v. Georgia,* 467 U.S. 39, 46, 104 S.Ct. 2210, 2215, 81 L.Ed.2d 31 (1984). In the instant case, although the public had been precluded from hearing the tape recordings at the precise instant that the jury listened to them, the trial court advised defense counsel that it would arrange to have the tapes played in their entirety for those members of the public interested in listening to them. Defense counsel declined this offer. Accordingly, violation of the Sixth Amendment's guarantee of a public trial, if any occurred, was waived by defense counsel's tactical election to reject the trial court's alternative procedure to permit the public to listen the [sic] tapes at issue. *See, e.g., Allen v. Morris,* 845 F.2d 610, 616 (6th Cir. 1988), *cert denied,* _____ U.S. _____, 109 S.Ct. 799, 102 L.Ed.2d 790 (1989); *accord Taylor v. Illinois,* 484 U.S. 400, _____, 108 S.Ct. 646, 657, 98 L.Ed.2d 798 (1988).

The appellant has also suggested that the district court erred in its procedure for permitting the jury to review printed transcripts of the tape recordings in question. The government FBI agent, who was responsible for the printing of the transcription of the tapes, testified that the printed transcripts were a fair and accurate representation of the contents of the tapes themselves. On appeal, Mathes has charged that this procedure violated this court's teachings in *United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983), which indicated that, generally, a transcript's accuracy should *either* be stipulated by the parties, or that *both* the transcribing party *and* the trial court should examine the transcript to determine its accuracy. *Robinson*, 707 F.2d at 879. In the instant case, Mathes argued that the trial court committed reversible error since it did not independently review McCorkle's printed transcripts to determine their accuracy.

The appellant, however, errs in suggesting that *Robinson* established a *per se* rule requiring the trial judge to personally verify the accuracy of a submitted printed transcription in all instances. Indeed, the use of such terms as "reiterate our preference," "the transcriber *should* verify that he . . . has . . . accurately transcribed its contents," and "[t]he court *should* also make an independent determination of accuracy," by the court in its decision, *see Robinson*, 707 F.2d at 878-79, indicates that the court was establishing *general* directives for the guidance of the bench and bar, rather than strict instructions of a mandatory nature in all instances. Instead, a reviewing court must examine the specific procedures employed in each particular case to determine whether "the transcripts utilized at trial bear . . . [a] semblance of reliability." *Robinson*, 707 F.2d at 879.

In the instant case, the printed transcripts were sufficiently reliable to pass this test. The tapes were transcribed by agent McCorkle, who relied upon the tapes themselves in preparing the printed transcripts, rather than soliciting the opinions of other agents as to their recollection of the tapes' contents as occurred in *Robinson.* Additionally, the trial court carefully instructed the jury to first listen to the tape recordings themselves and then, only if they had questions or problems, to examine the printed transcripts *along with the tapes,* during a *second* review of material, in contrast to *Robinson,* wherein the jurors were given the printed transcripts only at the time the tapes were played. Finally, unlike *Robinson,* defense counsel has not suggested in the case at bar that the tapes were inaudible or undecipherable, even though he had personally reviewed the tapes and the government's printed transcripts, both before and during the trial. Accordingly, it would appear that the district court did not abuse its discretion in permitting the jury to examine the submitted printed tape transcripts.

Finally, even if it were assumed that the trial court abused its discretion in permitting the jury to have the printed transcriptions of the tape, the error would be harmless because the defendant failed to identify any specific and demonstrable prejudice which inured to his detriment as a result of the trial court's ruling. *See, e.g., United States v. Dorn,* 561 F.2d 1252, 1257 (7th Cir. 1977) (per curiam), *overruled in part on other grounds sub nom. United States v. Read,* 658 F.2d 1225 (7th Cir. 1981); *accord United States v. Costa,* 691 F.2d 1358, 1363 (11th Cir. 1982).

The appellant next charged that the district court erred in refusing to instruct the jury on the lesser included offense of mere possession of cocaine, rather

than the more serious offense of possession of cocaine with intent to distribute it. "[I]t is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States,* 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973) (citations and footnotes omitted). "Possession of a controlled substance, relative to the crime of possession of such with intent to distribute, is a prototypical 'lesser included offense.' " *United States v. Burns,* 624 F.2d 95, 104 (10th Cir.), *cert. denied sub nom. Reynolds v. United States,* 449 U.S. 954, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980).

Mathes has argued that he was entitled to have the jury instructed on the lesser included offense of simple possession of cocaine, and that the trial court's failure to have so instructed the jury, after defense counsel had properly argued the issue, is reversible error. Existing case precedent indicates that as a "prerequisite for a lesser included offense instruction . . . the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Schmuck v. United States,* 489 U.S. _____, _____ n.8, 109 S.Ct. 1443, 1450 n.8, 103 L.Ed.2d 734 (1989) (citing *Keeble,* 412 U.S. at 208, 93 S.Ct. at 1995). In the instant case, the trial court correctly denied the appellant's request that the jury be charged on the lesser included offense of mere possession because "the evidence [was] such that the jury could not rationally find the defendant guilty of the lesser offense." *United States v. Payne,* 805 F.2d 1062, 1067 (D.C. Cir. 1986).

Mathes was charged with possession of cocaine with intent to distribute, and with aiding and assisting Brown in the possession of cocaine with the intent to distribute, based upon the five kilograms of cocaine which Mathes had delivered to Brown in the parking lot. Mindful of the fact that Mathes had delivered the five kilograms of cocaine confiscated from Brown, the argument that Mathes possessed such a substantial quantity of cocaine for his personal use is absurd. *Burns*, 624 F.2d at 104. Furthermore, even if this court concluded that the district court erred in failing to instruct the jury on the lesser included offense in the case at bar, in light of the weight of the evidence developed at the trial, any such error would be deemed harmless. *See, e.g., United States v. Guyon*, 717 F.2d 1536, 1544-45 (6th Cir. 1983), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1984). Accordingly, the district court did not err in rejecting appellant's request to charge the jury on the lesser included offense.

This court has considered the defendant's remaining assignments of error and has concluded that they are without merit. Accordingly, the judgments of conviction entered against Mathes are hereby AFFIRMED.

ISSUED AS MANDATE: October 10, 1989
COSTS: None

CERTIFICATE OF SENTENCE FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO

(Filed December 6, 1988)

Case No. 88-718

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

NATHANIAL C. MATHES,
Defendant.

CERTIFICATE OF JUDGMENT

Judge Nicholas J. Walinski

I, James S. Gallas, Clerk of the United States District Court with and for the district aforesaid, do hereby certify that a Judgment and Commitment in criminal case 88-718, was rendered in said Court on December 6, 1988, in favor of Plaintiff, United States of America, judgment creditors, 305 U.S. Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio 43624, against Nathanial C. Mathes, 632 Woodstock, Toledo, Ohio 43607, judgment debtor, in the sum of One hundred Dollars and no Cents ($100.00), said judgment noted in the docket on December 6, 1988. Currently owing on this judgment is a balance of $75.00.

JAMES S. GALLAS, *Clerk*
United States District Court
By SHIRLEY J. AFTON
Deputy Clerk

SEAL

JUDGMENT INCLUDING SENTENCE FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO

Case Number CR 88-718-01

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

v.

NATHANIAL C. MATHES, a/k/a
NATHANIAL C. MATHEWS.

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

(Name of Defendant)

Jon D. Richardson
William A. Garrett
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____.

[x] was found guilty on count(s) one & two after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	*Nature of Offense*	*Count Number(s)*
21:841(a)(1) & 18:2	Possession with intent to distribute 2 kilograms of cocaine	1
21:841(a)(1)	Possession with intent to distribute 5 kilograms of cocaine	2

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[x] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[ ] It is ordered that the defendant shall pay to the United States a special assessment of $100.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

286-60-2365

December 5, 1988
Date of Imposition of Sentence

Defendant's mailing address:

Defendant in federal custody

/s/ NICHOLAS J. WALINSKI
Signature of Judicial Officer

Sr. U. S. District Judge,
Nicholas J. Walinski
Name & Title of Judicial Officer

Defendant's residence address:

_____

12/5/88
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one hundred fifty one months (151).

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

a.m.

[ ] at _____ p.m. on _____.

[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years on count one of the Indictment and the defendant shall be on supervised release for a term of five (5) years on count two of the indictment.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

(1) the defendant shall not possess firearms, ammunition, explosives, destructive devices or other dangerous weapons.

(2) the defendant is to provide the United States Probation Office with all financial information.

(3) the defendant is prohibited from opening any line of credit or new credit charges without the consent of the United States Probation Officer.